Sundor Brands, Inc. *and* International Union of Operating Engineers Local 68 AFL–CIO. Case 22–CA–22239

March 23, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

Pursuant to a charge and amended charge filed on August 28 and October 21, 1997, the General Counsel of the National Labor Relations Board issued a complaint on November 24, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish information following the Union's certification in Case 22-RC-11374. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On January 5, 1998, the General Counsel filed a Motion for Summary Judgment. On January 6, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the basis of the Board's unit determination and its Order permitting level 2 utilities coordinators to vote by challenged ballot in the representation proceeding. In addition, the Respondent denies that the requested information is relevant and necessary to the Union's role as bargaining representative.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. The Respondent contends that a special circumstance is presented by the delay (until after voting had begun) in the parties' receipt of the Board's order on request for review, which, inter alia, directed that the five level 2 utilities coordinators be allowed to vote only under challenge. The Respondent notes that only one challenged ballot was cast in the election and argues that ''it is likely that the remaining four Level II utilities coordinator[s] had voted prior to the parties' receipt of the Board's Order.'' The Respondent further contends, in reliance on *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294 (9th Cir. 1985), and cases cited therein, that the election was fatally flawed because the voters cast their ballots ''under the erroneous assumption that they were voting for a unit that included the Level II utilities coordinators.'' For the following reasons we reject the Respondent's contentions.

Because the Respondent failed to raise the issue of the belated receipt of the Board order in a timely filed election objection, it is foreclosed from presenting it now as a ''special circumstance.'' *NLRB v. Aaron's Office Furniture*, 825 F.2d 1167, 1170–1173 (7th Cir. 1987).[1] In any event, even if the Respondent's contentions were timely raised, we would find no merit to them. First, even assuming all the level 2 utilities coordinators had voted before the Board's vote-under-challenge order was received,[2] their votes could not be dispositive. The Respondent asserts, consistent with the underlying representation case record, that there were five level 2 utilities coordinators. The petitioner won the election by a margin of 15 to 6, with one challenged ballot, so 5 more votes would not make a difference. Second, as for the Respondent's ''inaccurate information'' argument, nothing in Board precedent supports it; and, unlike in *Lorimar*, the vote here was not close, and the classification of employees at issue (representing approximately 20 percent of the employees in the unit in which the election was directed) was not a substantial portion of the unit. Moreover, the election was directed in a skilled maintenance unit comprising five subclassifications, and the failure to include employees in one of those five-the level 2 utilities coordinators-did not alter its essential character as

[1] The Respondent's additional contention that the Regional Director's certification of a unit which did not include the level 2 coordinators was ''in contravention of the spirit, if not the letter, of the Board's order'' could not have been raised before the certification issued and thus could not have been filed as a timely objection. This contention, however, is without merit. The Board's order denied review of the Respondent's request for review to the extent that that request argued that a skilled maintenance unit was not appropriate; and, by directing that the level 2 utilities coordinators vote under challenge, the order put in question only whether they should be included in that unit. Under standard Board practice, when a classification of employees votes under challenge and their challenged ballots would not be determinative of the election results, the ensuing certification contains a footnote to the effect that they are neither included nor excluded. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11474. Even though there was no occasion to resolve the issue in a ballot challenge hearing, the issue need not stay unresolved. If the parties do not subsequently agree on whether to add them to the unit, the matter can be resolved in a timely invoked unit clarification proceeding. See *Kirkhill Rubber Co.*, 306 NLRB 559 (1992); *NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 496–497, 500 fn. 7 (5th Cir. 1992), and cases there cited.

[2] The Respondent proffers no evidence that this occurred.

a skilled maintenance unit. There was therefore no significant change in scope and character of the unit. See *Toledo Hospital*, 315 NLRB 594 (1994)(adding classifications to skilled maintenance unit did not significantly alter scope and character); *Morgan Manor Nursing & Rehabilitation Center*, 319 NLRB 552, 552–553 (1995)(scope and character not altered by exclusion of licensed practical nurses from service and maintenance unit in which they constituted about 20 percent of the unit total). We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find there are no factual issues warranting a hearing regarding the Union's request for information. The complaint alleges, and the Respondent admits, that the Union requested the following information from the Respondent:

> 1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, and social security number;
> 2. A copy of all current personnel policies or procedures;
> 3. A statement of all company policies or procedures other than those mentioned in Number 2 above;
> 4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, health and welfare, apprenticeship, training, legal services, or any other plans which relate to the employees;
> 5. Copies of all current job descriptions;
> 6. Copies of any wage and salary plans;
> 7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year.

It is well established that, with the exception of employee social security numbers, such information is presumptively relevant for purposes of collective bargaining and must be furnished on request.[3] The Respondent has not rebutted the presumption.

Accordingly, we grant the Motion for Summary Judgment and will order the Respondent to bargain with the Union and to furnish the Union with the information it requested, with the exception of employee social security numbers.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in South Brunswick, New Jersey, has been engaged in the processing and distribution of juice beverages. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, purchased and received at its South Brunswick, New Jersey facility, goods and services valued in excess of $50,000 directly from points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 30, 1997, the Union was certified on June 11, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part time skilled maintenance employees including advanced maintenance technicians, maintenance group leaders, electrical and instrumentation technicians, and level 3 utilities coordinators, employed by the Respondent at its South Brunswick, New Jersey facility, but excluding all office clerical employees, all level 2 mechanical/electrical technicians, team coordinators, industrial health and safety specialists, site environmental leaders, risk management leaders, level 1 technicians, and all other employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about June 25, 1997, the Union has requested the Respondent to bargain and to furnish information, and, since about July 8, 1997, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[3] The Board has held that employee social security numbers are not presumptively relevant and that the Union must therefore demonstrate the relevance of such information. See, e.g., *Dexter Fastener Technologies*, 321 NLRB 612 (1996); and *Maple View Manor*, 320 NLRB 1149 (1996). Here, the record fails to indicate why the Union wanted the social security numbers or otherwise establish the relevance of the numbers. Accordingly, we cannot conclude that the Respondent was obligated to provide the numbers to the Union. This does not excuse the Respondent's failure to supply all of the other information requested by the Union, however. Such information is clearly relevant, and the Respondent's failure to provide the information on request violated Sec. 8(a)(5) of the Act. See id.

CONCLUSION OF LAW

By refusing on and after July 8, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union necessary and relevant requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested, with the exception of the social security numbers.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Sundor Brands, Inc., South Brunswick, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers Local 68 AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time skilled maintenance employees including advanced maintenance technicians, maintenance group leaders, electrical and instrumentation technicians, and level 3 utilities coordinators, employed by the Respondent at its South Brunswick, New Jersey facility, but excluding all office clerical employees, all level 2 mechanical/electrical technicians, team coordinators, industrial health and safety specialists, site environmental leaders, risk management leaders, level 1 technicians, and all other employees, professional employees, guards and supervisors as defined in the Act.

(b) Furnish the Union information it requested June 25, 1997, with the exception of the social security numbers, that is relevant and necessary to its role as the exclusive representative of the unit employees.

(c) Within 14 days after service by the Region, post at its facility in South Brunswick, New Jersey, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Operating Engineers Local 68 AFL–CIO as

the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full time and regular part time skilled maintenance employees including advanced maintenance technicians, maintenance group leaders, electrical and instrumentation technicians, and level 3 utilities coordinators, employed by Sundor Brands, Inc. at our South Brunswick, New Jersey facility, but excluding all office clerical employees, all level 2 mechanical/electrical technicians, team coordinators, industrial health and safety specialists, site environmental leaders, risk management leaders, level 1 technicians, and all other employees, professional employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information it requested on June 25, 1997, with the exception of the social security numbers.

SUNDOR BRANDS, INC.